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In the

Supreme Court of the United States

October Term, 1958

No. 286

W. FRED DUCKWORTH, GEORGE R. ABBOTT, LINWOOD PERKINS, LAWRENCE C. PAGE, LEWIS L. LAYTON, ROY R. MARTIN, JR. AND N. B. ETHERIDGE, MEMBERS OF THE COUNCIL OF THE CITY OF NORFOLK, VIRGINIA, THE COUNCIL OF THE CITY OF NORFOLK, AND ALEX H. BELL, TREASURER OF THE CITY OF NORFOLK,

Petitioners,

v.

RUTH PENDLETON JAMES, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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v.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petitioners W. Fred Duckworth, George R. Abbott, Linwood Perkins, Lawrence C. Page, Lewis L. Layton, Roy R. Martin, Jr. and N. B. Etheridge, as members of the Council of the City of Norfolk, Virginia. The Council of the City of Norfolk, and Alex H. Bell as Treasurer of the City of Norfolk, respectfully pray that a writ of certiorari be issued to review a decree of the United States Court of Appeals for the Fourth Circuit entered May 18, 1959, hereinafter described.

THE OPINION BELOW

The opinion of the Court of Appeals has not yet been reported, but it appears in the typewritten portion of the certified Record, beginning on page 11.

The opinion of the District Judge is reported in 170 F. Supp. 342 and is also shown on pages 46-64 of the Appendix for the appellants (petitioners) also appearing in the certified Record. References to pages of the Appendix hereafter appear as "App. p. ....".

JURISDICTION

The decree of the Court of Appeals on appeal by petitioners affirmed a decree of the District Court of the United States for the Eastern District of Virginia entered January 27, 1959, granting a temporary injunction against the defendants, these petitioners.

The jurisdiction of this Court is invoked under Section 1254 of the Federal Judicial Code (28 U. S. C. A. 1254 (1)).

THE QUESTIONS PRESENTED

The facts hereinafter set forth present the following questions of law:

(1) The District Court improperly decided new questions of State law concerning a state statute not previously passed on by the state courts of Virginia, instead of referring the plaintiffs to the state courts.

(2) The suit was and is one against the State of Virginia of which the District Court had no jurisdiction, and the preliminary injunction was a direct exercise of Federal judicial power over funds of the State in derogation of its sovereignty.

(3) Neither the complaint of the respondents in the District Court nor the facts of record show any violation by the petitioners of the equal protection or due process clauses of the Fourteenth Amendment to the Constitution of the United States.

In considering the questions presented by this petition it should be borne in mind that neither the Constitution nor the laws of Virginia require the governing body of a city or county to provide funds for the support of public schools, but such support is optional and voluntary. *Board of Supervisors of Chesterfield County* v. *County School Board*, 182 Va. 266; *School Board of Carroll County* v. *Shockley*, 160 Va. 405; *Scott County School Board* v. *County Board of Supervisors*, 169 Va. 213.

By complaint in the District Court pursuant to which the injunctive order appealed from was entered, the respondents James and others, constituting numerous minor white children and white adults as a class suit, attacked the action of the City Council in the adoption of an ordinance November 25, 1958 and passage of two resolutions dated respectively December 30, 1958 and January 13, 1959, relating to the control and disposition of funds tentatively appropriated by the Council in the amount of $11,323,338.00, for the support of the public schools of the City of Norfolk for the school year beginning in September, 1958, and ending in June, 1959. The ordinance was adopted and the resolutions were passed, pursuant to the authority of Sections 22-127 and 22-127.1 of the Code of Virginia 1950, as amended, the operation and application of which by the Council were the subject of the complaint and of the preliminary injunction hereafter more fully described.

The ordinance and the resolutions are respectively Ex-

hibits 2, 3 and 4 of the Plaintiffs in the District Court (App. pp. 64-73).

Section 1 of the ordinance recites that the sums "are hereby appropriated, subject to the conditions hereinafter set forth in this ordinance." Sections 5, 6 and 7 are as follows:

> "Section 5 — That, by reason of the present legal situation with regard to the operation of the public schools of the City, the appropriation herein made for said public schools is made on a tentative basis, and no part of the funds so appropriated shall, in any event, be available to The School Board of the City of Norfolk except as the Council may, from time to time, by resolution authorize the payment or transfer of such funds, or any part thereof, to said School Board."
>
> "Section 6 — That the appropriation herein made for the public schools of the City is made on a tentative basis; that the Council reserves the right to change or cancel the unexpended portion of said appropriation for public schools at any time during said fiscal year; and that the Council reserves the right to prohibit the expenditure of the unexpended portion, or any part thereof, of said appropriation for public schools.
>
> "Section 7 — That all other amounts and allowances set out in detail in said Annual Budget, as amended, are fixed, as therein set forth, subject to the right of the Council to change or cancel the unexpended portion of the same at any time during the said fiscal year."

The resolution of December 30, 1958 (App. p. 69), provided for the transfer to the Norfolk School Board of $1,098,000 during January, 1959, on conditions that (1) no part of the sum shall be disbursed for the normal daytime operation of the schools now under the control of the Governor of Virginia without his prior approval; (2) reserving

to the Council the right to prohibit the expenditure of the unexpended portion, or any part thereof, of the $1,098,000, and (3) reserving to the Council the right to "change or cancel the transfer of so much of said sum of $1,098,000 as has not been transferred at the time of such change or cancellation."

The resolution of January 13, 1959 (App. p. 71), in substance recites that the appropriation ordinance of November 25, 1958, appropriated funds for the public schools of the City on a tentative basis, with the provision that no part of the funds would be available to the School Board except as the Council might from time to time, by resolution, authorize; the right reserved to the Council to change or cancel during the fiscal year the unexpended portion of the appropriation made therein for public schools, and the reservation of the right to prohibit the expenditure of the unexpended portion, or any part thereof, of the appropriation, and then proceeds:

> "WHEREAS, it is necessary for the immediate preservation of the public peace, property, health and safety and for the usual daily operation of the Department of Finance that the sense of the Council with respect to the maintenance and operation of the public schools of the City of Norfolk be immediately stated, an emergency is set forth, defined and declared to exist, pursuant to Section 15 of the Norfolk Charter of 1918; now, therefore,
>
> "BE IT RESOLVED by the Council of the City of Norfolk:
>
> "Section 1 — That the public welfare of the City of Norfolk requires the maintenance and operation of grades 1 through 6, both inclusive, as the public schools of said City.
>
> "Section 2 — That the Council does not propose, at this time, to authorize the payment or transfer to The

School Board of the City of Norfolk, for use by it during the month of February, 1959 or during any month subsequent thereto for the maintenance and operation of any grade higher than the sixth grade, of any part of the funds tentatively appropriated for the public schools of the City of Norfolk by the annual appropriation ordinance of the City of Norfolk for the fiscal year 1959, adopted November 25, 1958; and that said School Board is hereby requested to make such arrangements as may be necessary to maintain and operate, beginning February 2, 1959, only grades 1 through 6, both inclusive.

"Section 3 — That, the City of Norfolk will assume payment of the salaries and wages of the employees of said School Board which become due and payable after February 2, 1959, under contracts between said School Board and its employees in effect on February 2, 1959, and which are not otherwise paid or provided for."

THE COMPLAINT IN THE DISTRICT COURT

The complaint in the District Court attacked the actions of the Council set forth in the ordinance and the two resolutions, on the ground that the closing of certain of the Norfolk schools would result from the restrictions and limitations in the ordinance and in the two resolutions, and that the actions of the Council were part of an evasive scheme

> "designed to nullify lawful orders issued or which may be hereafter issued by this Court, and have deprived and will deprive the minor plaintiffs of liberty and property without due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment." (Complaint, paragraph 14)

The complaint further alleged that the action of the

Council would, if permitted, deprive the plaintiffs of the equal protection of the laws and would result in an unfair tax and financial burden upon them, thus depriving them of property without due process of law. (Complaint, paragraph 17, App. p. 10).

No question of racial discrimination was raised by the Complaint of the white plaintiffs or properly involved in the issues of this case.

THE PROVISIONS OF THE INJUNCTION

The injunction appears in full in App. pp. 29-31.

After finding in paragraph 3 that the actions of the City Council and its individual members "constitute an evasive and discriminatory scheme in violation of the Fourteenth Amendment to the Constitution of the United States, and are otherwise illegal", the injunction order restrains the defendants:

> "(a) From taking any action or steps, directly or indirectly, to enforce or apply the provisions of that statute of the Commonwealth of Virginia commonly designated as Sec. 22-127.1 of the Code of Virginia, 1950, as amended by the Extra Session of 1956.
>
> "(b) From withholding the funds for public schools heretofore appropriated by Ordinance No. 19,679 of the said Council enacted November 25, 1958, and from enforcing, applying or attempting to enforce or apply the conditions or restrictive provisions of Sections 5 and 6 of the said Ordinance or either of them, or from enforcing, applying or attempting to enforce or apply as to the defendant school board the restrictive provisions of Section 7 of said ordinance, except in the same percentage of reduction as said restrictive provisions are enforced and applied to all departments of the City of Norfolk.

"(c) From enforcing, applying, or attempting to enforce or apply, the restrictions upon the use of public school funds contained in resolution adopted by the said Council on December 30, 1958.

"(d) From enforcing, applying, or attempting to enforce or apply, the restrictive provisions or requests with respect to the use of public school funds which were expressed or implied in resolution of said City Council adopted January 13, 1959.

"(e) From in any manner, directly or indirectly, taking any steps or action designed to bring about the closing or continued closing of one or more public schools of the City of Norfolk or particular grades therein by reason of the assignment to, or enrollment or presence in, such schools or grade of children of different races or colors, while at the same time other public schools in the City of Norfolk are permitted to remain open on a segregated basis.

"(f) From engaging in any other evasive scheme looking to the cut-off of funds for schools or grades affected by the mixing of races, or because of the presence of children of only one race, or the closing or elimination of specific grades in such schools.

"(g) From, in an exercise or purported exercise of police power, closing any school or schools of the City of Norfolk or any class in such schools for more than two consecutive days on any one occasion without prior approval of this Court."

The Record demonstrates beyond question that the injunction exercises a direct mandatory control over state funds and in effect requires their disbursement by the City Council.

The right of the City Council to restrict its appropriation to the elementary schools depends on the construction of certain of the provisions of Chapter 67, of the Acts of the Special Session of 1956 (Acts p. 66, et seq.). These provi-

sions appear in the Virginia Code as Sections 22-127 and 22-127.1. Both of these sections should be read in connection with Section 22-126, and other sections which are expressly amended by Paragraph 1 of Chapter 67.

Section 22-126 of the Code as amended authorizes counties and cities to raise money by taxation "to be expended by the local school authorities in establishing, maintaining and operating such schools as in their judgment the public welfare requires."

Section 22-127 is as follows:

"Section 22-127. *Appropriation in lieu of levy.*—In lieu of making such school levy, the governing body of any county or city may, in its discretion, *make a cash appropriation*, ~~either tentative or~~ final, from the funds derived from the general county or city levy of an amount not less than the sum required by the county or city school budget provided for by Sec. 22-122 and approved by the governing body of the county or city, but in no event to be less than the minimum nor more than the maximum amount which would result from the laying of the school levy authorized by the preceding section for the establishment, maintenance and operation of the schools of the county or city and *for the payment* of grants for the furtherance of elementary or secondary education and transportation costs. In addition to this the governing body of any county or city may appropriate, *either tentatively or finally*, from any funds available, *sums as in its judgment may be necessary or expedient* for the establishment, maintenance and operation of the public schools in the county or city, and for the payment of such grants and transportation costs required or authorized by law.

"Whenever any such appropriations have been made *on a tentative basis, no part* of the funds so appropriated shall, in any event, be available to the local school board except as the local governing body may, from

time to time, by resolution authorize the payment or transfer of such funds, or any part thereof, to such local school board."

Section 22-127.1 of the Code is as follows:

"Section 22.127.1. Notwithstanding any other provision of law to the contrary, the governing body of any county, city or town which has made a levy for school purposes under Section 22-120 or Section 22-120 or has made a cash appropriation under Section 22-127 or any other provision of law may by resolution direct the school board of such county, city or town and the treasurer of such county, city or town to make no further expenditures of local school funds until further authorized to do so by such local governing body. Any school board, and each member thereof, and any treasurer who makes any expenditure of local school funds after being so directed not to make such expenditures shall be personally liable to make restitution to the county, city or town involved of the funds so expended in violation of any such resolution of the local governing body and may be removed from office under the provisions of Article 3."

Section 22-122, referred to in Section 22-127, provides for an estimate by the division superintendent of schools "of the amount of money which will be needed for the support of the public schools" to be approved by the School Board prior to submission to the tax levying body.

REASONS FOR GRANTING WRIT

1.

The District Court and the Court of Appeals Improperly Decided New Questions of State Law Concerning a State Statute Not Previously Passed On by the State Courts of

Virginia, Instead of Referring the Plaintiffs to the State Courts.

Not only did the District Court enjoin the Council from taking any action or steps, directly or indirectly, "to enforce or apply the provisions of that statute of the Commonwealth of Virginia commonly designated as Section 22-127.1 of the Code of Virginia 1950, as amended by the Extra Session of 1956", but in its Memorandum Opinion, p. 8 (App. pp. 54-56), the District Court expressly refrained from determining the constitutionality of Section 22-127 and 22-127.1. In another part of the Memorandum the District Court also held (App. pp. 59-60) that the resolution of the Council of January 13, 1959

> "directly violates the provisions of Section 22-126 of the Code of Virginia 1950, as amended, wherein the City is authorized to raise money by a tax on all property, subject to local taxation, at such rate as may be deemed sufficient 'to be expended by the local school authorities in establishing, maintaining and operating as in their judgment [the local school authorities] the public welfare requires.'"

Thus the District Court affirmatively undertook to construe provisions of the Virginia Code that had not previously been passed upon or interpreted by the state courts instead of remitting the plaintiffs to their state remedy. It should not be necessary to cite the numerous and recent decisions of this court holding that such action on the part of a Federal Court is improper. See *City of Meridian* v. *Southern Bell Telephone & Telegraph Co.*, ... U. S. ....., decided February 24, 1959; *Harrison, Attorney General of Virginia, et al* v. *National Association For the Advancement of Colored People, et al*, No. 127, October Term 1958, decided June 8, 1959; *Louisiana Power & Light Co.* v. *Thibodaux*, ... U.

S. ....., No. 398, October Term 1958, decided June 8, 1959; *Martin* v. *Creasy*, No. 157, October Term 1958, decided June 8, 1959; ..... U. S. .....

No motion to stay on the foregoing grounds was made by the defendants, but as we understand the decisions, the District Court, on the questions of state law in the case, should have stayed its hand *sua sponte*.

2.

The Suit Was and Is One Against the State of Virginia of Which the District Court Had No Jurisdiction, and the Preliminary Injunction Was a Direct Exercise of Federal Judicial Power Over Funds of the State in Derogation of Its Sovereignty.

We submit that here the State is actually the real party in interest, even though its agency, the Council, and its members, and the city treasurer, are the defendants. Therefore, the suit runs contrary to the principle never departed from by this Court that if, indeed, the state is the real party in interest, although not nominally a party, the suit is against the state. As said in *Ex Parte Ayers*, 123 U. S. 443, where the remedy sought was nominally against the Attorney General of Virginia to prevent him and Commonwealth Attorneys from suing to enforce the collection of taxes for the payment of bonds issued by the state, the suit was in reality one to compel state action, because its purpose was

> "to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds were paid in full."

This was an attempt to have the court

> "set up its jurisdiction over the officers in charge of the public monies, so as to control them as against the political power, in their administration of the finances of the state."

Thus, this case is different from those referred to in *Hagood* v. *Southern*, 117 U. S. 52, making the "broad line of demarcation" from suits to prevent state officers from committing tortious wrongs against individual rights from those

> "in which the decrees require, by affirmative official action on the part of the defendants the performance of an obligation which belongs to the state in its political capacity."

Such a suit cannot be entertained merely "upon the ground that the controversy arises under the Constitution or laws of the United States." *Missouri* v. *Fiske*, 290 U. S. 18.

This suit and the injunction are direct attempts to establish obligation or liability of the City Council to pay out the funds for the use of the public schools.

Mine Safety Appliances Co. v. *Forrestal*, 326 U. S. 371, although against an officer of the United States, is closely analogous, because the principle of sovereign immunity of a state from suit is identical with that of the immunity of the United States.

Mine Safety Appliances Co. sued Forrestal, then Under Secretary of the Navy, seeking an injunction and declaratory judgment to prevent the defendant from directing government disbursing officers to withhold payments due the plaintiff on other contracts sufficient in amount to offset the government's loss due to excessive profits on another contract. Holding that the suit was one against the United States in

spite of the contention of the plaintiff that the action merely sought to prevent a tort by the Secretary, acting as an individual and not as an officer of the government, consisting of a trespass against appellant's property, and that equitable relief was necessary because the plaintiff had no adequate remedy at law, the Court said:

> "The sole purpose of this proceeding is to prevent the Secretary from taking certain action which would stop payment by the government of money lawfully in the United States Treasury to satisfy the government's and not the Secretary's debt to the appellant. The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented. The underlying basis for the relief asked is the alleged unconstitutionality of the Renegotiation Act and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, though appellant denies it, the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensable party, Minnesota v. United States, 305 U. S. 382, 388, 83 L. ed. 235, 241, 59 S. Ct. 292, even though the Renegotiation Act under which the Secretary proposed to act might be held unconstitutional. Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 S. Ct. 128; Cunningham v. Macon & B. R. Co., 109 U. S. 446, 27 L. ed. 992, 3 S. Ct. 292, 609; Hagood v. Southern, 117 U. S. 52, 67, 68, 29 L. ed. 805, 810, 6 S. Ct. 608; Re Ayers, 123 U. S. 443, 496, 497, 505-507, 31 L. ed. 216, 226, 227, 229, 230, 8 S. Ct. 164; Pennoyer v. McConnaughy, 140 U. S. 1, 9, 35 L. ed. 363, 365, 11 S. Ct. 699; Wells v. Roper, 246 U. S. 335, 337, 62 L. ed. 755, 760, 38 S. Ct. 317; see

also Louisiana ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 S. Ct. 511. In short the government's liability cannot be tried 'behind its back'. Louisiana v. Garfield, 211 U. S. 70, 78, 53 L. ed. 92, 97, 29 S. Ct. 31."

Louisiana v. *Jumel*, 107 U. S. 711, cited in the *Forrestal* opinion, is important. *Jumel* was concerned with an attempt, through a mandamus proceeding, to compel indirectly payment of bonds of Louisiana, repudiated by a later statute of the state, by forcing state officials to make provision for payment of the bonds out of public funds. Holding that the suit was one against the state because the remedy sought implied power in the judiciary to compel the state to abide by its obligations, the Court said:

"by assuming the control of the administration of the fiscal affairs of the state to the extent that may be necessary to accomplish the end in view * * *. Here, however, the money in question is lawfully the property of the state. It is in the manual possession of an officer of the state. The bondholders never owned it. The most they can claim is that the state ought to use it to pay their coupons, but until so used it is in no sense theirs. * * * The remedy sought would require the court to assume all the executive authority of the state * * * until the bonds were paid in full. It needs no argument to show that the political power cannot thus be ousted of its jurisdiction and the judiciary set in its place."

The suit and the injunction are directly leveled against the City Council, a state agency, to compel action by the agency, not by the individuals composing the agency. Nothing can disguise the fact that the injunction requires *official* action by the Council to release the funds, or in other words; *state* action. Compare the opinion of Mr. Justice Frank-

furter in *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, at p. 713, where in analyzing the decisions on the question of state sovereignty it is said that

> "where the person sued could satisfy the court decree only by acting in an official capacity * * * the tortfeasor was not immunized, because he happened to hold office, but because the tort cannot be redressed, or if threatened, averted, without bringing into operation governmental machinery."
>
> * * *
>
> "Since the cases to which reference has just been made usually involve State debts and money in a State treasury, they have served to sponsor the proposition that a suit will not be permitted where the relief sought would 'expend itself on the public treasury or domain or interfere with the public administration', *Land* v. *Dollar*, 330 U. S. 731, 738. This is a way of saying that a court cannot entertain an action when the sovereign has not consented to be sued, if the judgment sought from the court would require an official to do that which he could only do by virtue of the fact that he is an official, that *quoad hoc* he is the State."
>
> * * *
>
> "The pervasive manifestations of modern government beget situations in which it is not always obvious whether the demand made upon an individual is, in Marshall's phraseology, 'not made personally, but officially.' Such an ambiguity as to the meaning of particular circumstances is a commonplace task for the judicial process. The governing principle is clear enough. If a defendant is asked to transfer the possession or title of property which is the Government's, judged by the conventional tests of possession or ownership, *or if he is asked to exercise authority with which the State has invested him and the desired action is in fact governmental action so far as an individual is ever pro tanto the impersonal government, such demands are effective*

ly demands upon the sovereign, which require the sovereign's consent as a prerequisite to the grant of judicial remedies.

* * *

"Specifically, there are instances where the unconstitutionality of a statute was conceded and yet the language of sovereign immunity was invoked to bar suit. See, e.g., North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 S. Ct. 509; Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 33 L. ed. 589, 10 S. Ct. 260; Louisiana ex rel. New York Guaranty & I. Co. v. Steele, 134 U. S. 230, 33 L. ed. 891, 10 S. Ct. 511. These cases do not qualify the principle of the cases in category two. Regard for the facts of these cases brings them within the first category because the nature of the relief requested makes them either *cases in which Government property would have to be transferred, or cases where the person sued could satisfy the court decree only by acting in an official capacity.* The tortfeasor, that is, is not immunized because he happened to hold office, but because the tort cannot be redressed, or, if threatened, *averted, without bringing into operation governmental machinery.*

* * *

"* * * So, also, if the relief sought by an injured plaintiff would involve, in part at least, destruction of the Government's interest in property, that part of relief cannot be granted even though a tort committed by a governmental agent gave rise to the injury. Belknap v. Schild, 161 U. S. 10, 40 L. ed. 599, 16 S. Ct. 443; Hopkins v. Clemson Agri. College, 221 U. S. 636, 55 L. ed. 890, 31 S. Ct. 654, 35 L.R.A. N.S. 243. To the extent that relief can be granted without affecting property rights of a State, not a consenting party to a controversy, an action is not barred. Hopkins v. Clemson Agri. College, 221 U. S. 636, 649, 55 L. ed. 890, 896, 31 S. Ct. 654, 35 L.R.A. N.S. 243, supra. See International Postal Supply Co. v. Bruce, 194 U. S. 601, 605, 606, 48 L. ed. 1134, 1137, 24 S. Ct. 820.

"Since the cases to which reference has just been made usually involve State debts and money in a State treasury, they have served to sponsor the proposition that *a suit will not be permitted where the relief sought would 'expend itself on the public treasury or domain, or interfere* with the public administration.' Land v. Dollar, 330 U. S. 731, 738, 91 L. ed. 1209, 1215, 67 S. Ct. 1009. This is a way of saying that a court cannot entertain an action, when the sovereign has not consented to be sued, *if the judgment sought from the court would require an official to do that which he could only do by virtue of the fact that he is an official, that quoad hoc, he is the State.*"

* * *

"The matter boils down to this. The federal courts are not barred from adjudicating a claim against a governmental agent who invokes statutory authority for his action if the constitutional power to give him such a claim of immunity is itself challenged. Sovereign immunity may, however, become relevant because the relief prayed for also entails interference with governmental property or brings the operation of governmental machinery into play. The Government then becomes an indispensable party, and without its consent cannot be implicated. See Mr. Justice Brandeis in Morrison v. Work, 266 U. S. 481, 487, 69 L. ed. 394, 397, 398, 45 S. Ct. 149." (All emphasis in foregoing excerpts supplied.)

* * *

"And if the relief necessarily implicates a resort to State funds the State becomes an indispensable party and without its consent the suit must fail. See Louisiana v. McAdo (U. S.), supra, Lankford v. Platte Iron Works Co., 235 U. S. 461, 59 L. ed. 316, 35 S. Ct. 173."

It should not be forgotten that the City Council never *actually and definitely appropriated* funds to cover the school budget.

Beyond any question, the injunction both in purpose and effect is to require the Council "to do that which" they "could only do by virtue of the fact that" it is "official, that *quoad hoc*", it "is the State."

Although the opinion of Mr. Justice Frankfurter was a dissenting one on a procedural point not germane to any question on this appeal, the opinion concurs with the majority in holding that the suit was against the sovereign. And it should be noted that the majority opinions decided that the suit could not be maintained because, although brought to enjoin a government officer to prevent him from committing a tort by wrongfully withholding possession of property alleged by plaintiff to be owned by it, it was a suit against the sovereign.

Paragraph (b) of the prayer of the complaint of appellees asks for injunction restraining the "defendant Council * * * *from withholding* the funds for public schools appropriated by Ordinance No. 19,679 of the said Council adopted on the 25th day of November, 1958; * * *".

And this is just what the injunction does.

This is no different from the relief sought in the Federal Court in South Carolina, where in *Murray* v. *Wilson Distilling Company*, 213 U. S. 151, a creditor of the State Dispensary Commission obtained an injunction preventing the State Commission appointed to liquidate and close out the liquor dispensary system, from paying out the fund in its hands without paying the debt to Wilson Distilling Company. The Supreme Court held that the suit, being one against the State, could not be permitted.

Although the Supreme Court held that the injunction was in effect or to require the state to discharge its contractual obligation out of a trust fund for creditors; there is no possible sound distinction between such an injunction and the one sought and obtained in the case at bar, requiring

the appellant Council to perform its alleged obligation to release the funds for the Norfolk Schools.

As further said in the opinion of Mr. Justice Frankfurter, citing the *Wilson Distilling Company* and other decisions, 337 U. S. at pp. 709-710, as suits against the State:

> "Cases in which the plaintiff seeks an interest in property which concededly, even under the allegation of the complaint, belongs to the government, or calls for an assertion of what is unquestionably official authority".

THE OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals (p. 11) justifies the injunction on the ground that unlawful action of a state officer or state body can be enjoined as a tort. On this theory any suit aimed against a state official, even though the purpose is to control state funds, can evade the rule of sovereign immunity. But the decisions analyzed by Mr. Justice Frankfurter in the *Larson* case clearly deny the soundness of the argument as applied to the facts here. *Home Telephone Company v. City of Los Angeles*, 227 U. S. 278, cited by the Court of Appeals as its principal authority, was a suit by the Telephone Company to enjoin an ordinance of the city fixing telephone rates. It had nothing whatever to do with the control of state funds and was predicated solely on the theory that the ordinance violated the Fourteenth Amendment. The reasoning of the opinion and the decisions cited in the *Home Telephone Company* opinion are wholly irrelevant to the issue of state sovereignty presented in the case at bar.

Earlier language in the opinion of the Court of Appeals presents a glaring inconsistency with the reasoning that the *Home Telephone Company* case is controlling.

On page 10 of the opinion of the Court of Appeals, it is conceded:

> "In the case of a municipal corporation, the State charter creates the legislative body and grants it power to act within a certain area. In the pending case the City Council was empowered to make appropriations, tentative or permanent, for the support of the schools, and hence the acts of the City Council in a sense became the acts of the State."

The opinion then proceeds, however, that if the power was misused, in violation of the Federal Constitution, the Federal Courts may issue an injunction in the same way as if an act of the General Assembly of the State had been passed in violation of the constitutional rights. This ignores the fact that the exercise of the injunctive power is directly against the State, because the injunction exercises direct control over State funds.

In the majority opinion of Mr. Chief Justice Vinson in the *Larson* case, it is said (337 U. S. p. 695):

> "It is argued that an officer given the power to make decisions is only given the power to make correct decisions. * * * We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general laws of torts. *But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.* (Emphasis supplied)

Further in the opinion of Mr. Chief Justice Vinson, on page 693, it is said:

"In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights. If he does not do so, the suit must fail even if he alleges that the agent acted beyond statutory authority or unconstitutionally. *But, in a suit against an agency of the sovereign, it is not sufficient that he make such a claim. Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented.*" (Emphasis supplied)

The opinion of the Court of Appeals says further that

"The plaintiffs in the present suit, however, do not seek an injunction to require the State to pay out any money."

This is not true. The clear object of the suit is to force the Council to release the funds. The opinion cites the *Larson* case on page 13, saying that a court may entertain a suit against a State officer for relief from actions in his official capacity—if the actions are illegal in the sense that they are not within his statutory powers, or, if the statutory powers cover the action but are constitutionally invalid or are exercised in an unconstitutional manner. But we submit that the opinions in *Larson* contain no such holding. This is only a way of saying that if a Federal Court conceives that a

State officer or state body acts, or attempts to act, in violation of the Fourteenth Amendment, then a Federal Court may issue an injunction directly controlling the use of State funds in contravention by this Court has gone so far. Such a theory is directly opposed to the rule stated *supra* in the opinion of Mr. Chief Justice Vinson and in *Missouri* v. *Fiske*, 290 U. S. 18, cited *supra*, p. 13 of this Petition.

3.

Neither the Complaint of the Respondents in the District Court Nor the Facts of Record Show Any Violation by the Petitioners of the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

Neither the opinion of the District Court nor that of the Court of Appeals contain any explicit holding that the Council violated any Federal constitutional rights of the plaintiffs under the equal protection or due process clauses of the Fourteenth Amendment. The Virginia statutes under which the Council acted, Sections 22-127 and 22-127.1, were not held unconstitutional. On the contrary, the opinion of the Court of Appeals, referred to *supra*, impliedly admits that those two sections are valid, but then proceeds on the theory that the action of the Council was unconstitutional because it attempted to apply the statute in an unconstitutional manner. Such was also the holding of the District Court, but it is not explained how or why the action of the Council was in fact unconstitutional. The complaint charges, and both the District Court and the Court of Appeals held, that the action of the Council was in pursuance of an evasive scheme to defeat or circumvent lawful orders of the District Court. The only two orders that could possibly be involved were, first, the order in *Beckett* v. *School Board of the City*

of Norfolk, 148 F. Supp. 430; affirmed 246 F. (2d) 325, and, second, the order of the three-judge court in *James v. Almond*, 170 F. Supp. 331, in which the Court held unconstitutional the series of acts of the Special Session of the Virginia Assembly of 1956, generally referred to as the massive resistance statutes.

But the action of the Council in the case at bar was in no way evasive of either of the orders. Nor were the Council or its members parties to either case. The order in the *Beckett* case provided only that the School Board could not refuse admission to previously all white schools solely on the grounds of race or color. In *James v. Almond* the Court struck down the massive resistance statutes. It is true that in the opinion in that case the Court referred to evasive schemes, and said at page 338:

> "While the county or city, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise in the management of such a school system, no one public school or grade in the county or city may be closed to avoid the effect of the law of the land while other public schools or grades remain open at the expense of the taxpayers. Such schemes or devices looking to the cutoff of funds for schools or grades affected by the mixing of races, or the closing or elimination of specific grades in such schools, are evasive tactics which have no standing under the law."

No authority is cited for this extreme statement, nor do we believe that any can be found applicable to the facts of this case. The theory expressed in the foregoing quotation is a distortion of the language in *Cooper v. Aaron*, 358 U. S. 1; which was decided on an entirely different state of facts. The District Court could have no possible jurisdiction except

under the Fourteenth Amendment, but the action of the Council created no denial of equal protection of the laws nor denial of due process to the white plaintiffs in the case at bar. They were not discriminated against by the closing of certain of the Norfolk schools. None of the members of the Negro race were complaining of the action of the Council, and we fail to comprehend under what phase of judicial power the three-judge court could undertake such a dictum or the Court of Appeals permit it to be applied at the suit of the white plaintiffs. Where the class which includes the party complaining is in no manner prejudiced, the general rule is that it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the laws. 11 Am. Jur. Constitutional Law, Sec. 113; *Monamotor Oil Co. v. Johnson*, 292 U. S. 86; *Shearer v. Burnet*, 285 U. S. 228; *New York Ex Rel Hatch v. Reardon*, 204 U. S. 152. Whatever the merits of the action of the Council if attacked in a state court as illegal under state law, it is respectfully submitted that the District Court had no jurisdiction and that the suit should have been dismissed.

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No. 286

Office-Supreme Court, U.S.
FILED
AUG 8 1959
JAMES R. BROWNING, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7848.

W. Fred Duckworth, George R. Abbott, Linwood Perkins, Lawrence C. Page, Lewis L. Layton, Roy B. Martin, Jr., and N. B. Etheridge, as Members of the Council of the City of Norfolk, The Council of the City of Norfolk, and Alex H. Bell, as Treasurer of the City of Norfolk,
Appellants,

versus

Ruth Pendleton James, a minor, etc., et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued April 7, 1959. Decided May 18, 1959.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Leonard H. Davis and W. R. C. Cocke (Leigh D. Williams on brief) for Appellants, and Archie L. Boswell and Edmund D. Campbell for Appellees.

SOBELOFF, Circuit Judge:

This appeal is taken from an order of the District Court whereby a preliminary injunction was issued against the members of the Council of the City of Norfolk, Virginia and the Treasurer of the City, restraining them from enforcing or applying the provisions of § 22-127.1 of the Code of Virginia as amended by the laws of the Extra Session of the Legislature of Virginia of 1956, and also from enforcing or applying the provisions of certain ordinances of the City Council enacted on November 25, 1958, December 30, 1958 and January 13, 1959, respectively, in such a way as to withhold funds appropriated by the Council for the use of the public schools of the city or bring about the closing of any of the schools by reason of the assignment thereto of children of different races.

The suit was instituted on January 15, 1959, by numerous minor children and their parents of the white race in order to forestall the closing of certain grades in the public schools of the city whereby more than 17,800 pupils would be deprived of public education. The complaint charged that the City Council was engaged in an evasive scheme to nullify certain orders issued or to be issued by the District Court in the suit of *James v. Almond* then pending, which had been instituted on October 27, 1958, by some of the plaintiffs herein in order to secure an adjudication that certain statutes passed at the Extra Session of the General Assembly of the State in 1956 were unconstitutional in that they were designed, as part of a plan of massive resistance, to avoid the decisions of the Supreme Court of the United States directing the desegregation of the races in the public schools of the country. In addition, it was alleged in the complaint that there was

pending in the Supreme Court of Appeals of Virginia a suit sub nom. *Harrison* v. *Day*, which had been brought to test the constitutionality under the Constitution of the State of some of the same statutes, and it was alleged that decisions in both cases were expected to be filed in accordance with public announcements on January 19, 1959.

These expectations were realized. On that day the Virginia court rendered its decision in *Harrison* v. *Day*, 204 Va. 439; 100 S.E. 2d 636, wherein it held that the section of the State Constitution which requires the maintenance of a public school system was still in force, although the section of the constitution requiring the segregation of the races in the schools had been stricken down by Federal judicial decisions. The Virginia court also held unconstitutional certain statutes of the state designed to prevent the enrollment of white and colored pupils in the same schools by closing them when such an event occurred, and by divesting local school authorities of the power to control the schools and vesting such power in the Governor of the State.

On the same day the District Court below, then composed of three judges, rendered its opinion in *James* v. *Almond*, 170 F. Supp. 331, in which it held that the Commonwealth of Virginia, having set up a system of public schools could not, without violating the Federal Constitution, act through one of its officers to close one or more of the schools on account of the enrollment of children of different races and at the same time keep open other schools on a segregated basis. The nature of the decision of the three-judge court had been anticipated by members of the City Council because it had been held in numerous decisions in this and other Federal Circuits that attempts by State

authorities to avoid the decisions of the Supreme Court of the United States were unconstitutional. It was in this posture of public affairs in the State that the pending suit came to trial on January 26, 1959, and the District Judge was asked to issue a preliminary injunction forbidding the enforcement of the enactments above mentioned on the ground that they were designed to avoid the effect of the decisions of the State and Federal courts and to continue the segregation of the races in the public schools of the City of Norfolk.

The case was submitted to the court upon a stipulation of facts and upon uncontradicted testimony offered by the plaintiffs to the following effect as to the conditions prevailing when the ordinances were passed and the suit was brought. The minor plaintiffs were all entitled to enrollment in the schools to which they sought admission if the schools had been in operation. Three senior and three junior high schools had been closed pursuant to a communication from the Governor of the State dated September 27, 1958, acting under Chapter 68 of the Acts of the Legislature passed at the Extra Session of 1956, subsequently held unconstitutional in the cases cited above. This action on the part of the Governor followed the issuance of an order of the District Court, passed on September 18, 1958, and affirmed by this court on September 27, 1958, in *Becket v. School Board of the City of Norfolk*, 260 F.2d 18, whereby the school board was directed to admit 17 Negro children to certain high schools of the city. By reason of these circumstances the high schools mentioned above were closed to 10,000 white pupils while the colored high schools remained open.

In this situation the City Council on September 30, 1958, prior to the institution of the pending suit, adopted a resolu-

tion directed to the Governor and the General Assembly wherein it expressed its earnest desire that the six high schools be immediately opened and operated under a State-operated system provided by statutes passed at the Extra Session of 1956 so that none of the 10,000 children would be delayed in securing the education provided for them by law. The schools, however, remained closed at the time of the institution of the pending suit and until after the decisions of *Harrison* v. *Day* and *James* v. *Almond* had been passed.

On November 25, 1958, the City Council passed an ordinance making appropriations for the city budget for the calendar year 1959 in the sum of $36,887,440.05, which included the sum of $11,323,338.00 for the public schools, thereby making provision not only for the schools that were open but for the schools that were closed in amounts comparable with those appropriated in previous years. The ordinance recited that, by reason of the pending legal situation with regard to the public schools, the appropriation for the schools was made on a tentative basis and no part of the funds appropriated should be available to the School Board of the city except as the City Council might, from time to time, authorize by resolution. The City Council also reserved the right to change the appropriation at any time during the fiscal year and to prohibit expenditure of any unexpended portion of the public school funds.

This form of appropriation was made in accordance with §§22-126 and 22-127 of the Virginia Code as amended at the Extra Session of 1956. These statutes authorized counties and cities of the State to raise money by local taxation, to be expended by the school authorities for the maintenance of the schools as in their judgment the public welfare required. They also authorized the local govern-

mental authorities to make a cash appropriation, tentative or final, of not less than the sum required by the local school budget for the maintenance and operation of the schools. The governing body of the city was authorized by resolution to direct the School Board of the city or town, and the Treasurer thereof, to make no expenditures of school funds until authorized by the governing body.

On December 30, 1958, the City Council adopted a resolution authorizing the transfer of $1,098,000 to the School Board for its use during the month of January 1959, but stipulated that no part of said sum should be disbursed for the normal daytime operation of the schools then under the control of the Governor of Virginia without his prior approval.

Thereafter, on January 13, 1959, the City Council adopted a further resolution designed to bring about the closing of additional schools of the City of Norfolk, which led to the institution of the pending suit. The ordinance declared that the public welfare of the city required the maintenance and operation of grades 1 to 6 of the public schools of the city but that the City Council did not propose that any part of the funds theretofore appropriated for the city schools for the year 1959 should be paid to the School Board for the maintenance of grades higher than the sixth. The ordinance requested the School Board to make such arrangements as might be necessary to maintain and operate only the first six grades after February 2, 1959. The ordinance, however, provided that the city would assume the payment of the salaries and wages of the employees of the School Board which became due after that date under contracts between them. It was stipulated at the hearing of the pending suit that if this resolution should be carried out, the six white high schools above mentioned

would remain closed and, in addition, the higher grades in thirty-six other schools would be discontinued so that the minor plaintiffs and others similarly situated would be unable to attend the schools, and approximately 7,000 additional children of the city, making 17,600 children in all, or 40 per cent of the normal school population, would be deprived of the benefits of a public school education.

These circumstances justified the conclusion of the judge that the action of the City Council was taken as part of the plan of massive resistance adopted by the Extra Session of 1956 to retain segregation in the public schools of the State. A glaring inconsistency is manifest between the earlier action of the City Council and that which was taken later when it became apparent that the plan of massive resistance had failed. On September 30, 1958, the City Council declared that it was necessary for the immediate preservation of the public peace, property, health and safety of the city to provide for the daily operation of the public schools and that for this purpose the closed high schools should be immediately opened and operated, pursuant to the Acts of the Assembly. But on January 13, 1959, when the decisions of the courts above mentioned were imminent, the City Council declared that it was necessary for the immediate preservation of the public peace, property, health and safety that all of the schools higher than the sixth grade be closed and that none of the funds appropriated therefor should be used for their maintenance and operation.

The only reasonable explanation for this change of view is that the City Council, realizing that the general plan of massive resistance had failed, took steps to avail itself of the authority conferred by §22-127.1 of the Code to

withdraw the appropriation it had already made and thus accomplish at least a part of the original plan. This statute was indeed part of the general scheme which the General Assembly in the Extra Session had enacted. The response to this new plan by a large part of the white population, who desired to keep all the schools open, was the present suit.

In opposition to this conclusion, defendants refer to the testimony of members of the City Council to the effect that the ordinance of January 13, 1959, was passed not to evade constitutional prohibitions against segregation but on account of serious doubts as to the extent to which the State's financial support of the schools would be curtailed and in the genuine belief that serious disorders and destruction of school property would occur if the races were commingled in the public schools; and it is added that the absence of good faith on the part of the Council is not shown by the fact that no disorder actually occurred when the six high schools were opened very shortly after the decisions in *Harrison* v. *Day* and *James* v. *Almond* had been filed.

This testimony, however, is largely offset by the City's assumption of all the contractual obligations of the School Board, which comprised 92 per cent of the total costs of operation, with the result that although all of the grades above the sixth would be closed the teachers would continue to draw their salaries. The excuse that the upper grades were closed in order to avoid violence and disorder is also frail, in view of the fact that desegration of the lower grades was not contemplated. In any event, the excuse cannot prevail over the established rule that the preservation of the public peace cannot be used to justify the violation

of constitutional rights. See *Cooper* v. *Aaron*, 358 U.S. 1. We are of the opinion that the judge's finding as to the purpose and effect of the ordinance was sustained by the evidence.

The defendants nevertheless contend that, even if the purpose of the City Council was to avoid the effect of the judgment of the District Court, the ordinance of the City Council was a valid exercise of the power given it by the Virginia statutes to control the appropriation and expenditure of school funds. It is pointed out that the Federal District Court has no power to regulate or control the Norfolk schools and made no attempt to do so in the judgment in the *Beckett* case; and that, on the other hand, the City Council is not obliged to adopt the budget submitted to it by the School Board but may appropriate such moneys for the schools as it sees fit and, moreover, has the power under §§22-127 and 22-127.1 of the Virginia Code to appropriate school funds tentatively or finally, and if it appropriates funds on a tentative basis, they are not available to the School Board except as the transfer of them may be authorized from time to time by the City Council.

The answer to this argument is obvious and clear. The City Council in the ordinance under attack did not confine itself to the area of its discretionary power over appropriations. It went further and invaded the domain of the School Board and attempted to exercise the power to operate the schools vested in the school authorities by the State Constitution when it took steps to bring about the closing of all school grades above the sixth in the city school system. The decision of the Supreme Court of Appeals of Virginia in *Harrison* v. *Day* demonstrates the invalidity of this action. It was there shown that §129 of

the State Constitution requires the State to maintain an efficient system of public schools throughout the State and that such a system embraces such factors as a sufficient number of schools with adequate buildings and equipment, a sufficient number of competent teachers and other basic needs associated with the public school system; and that §133 of the Constitution vests the supervision of the schools in the local school boards and §136 requires that local school taxes be expended by local school authorities. By reason of these requirements of the Constitution, the court held that the General Assembly of the State could not establish a school system divesting the local school authorities of power and control over the local schools and vesting such authority in the Governor and State Board of Education. Much less can the City Council of Norfolk, notwithstanding its control of the purse, arrogate to itself the power to operate the public schools of the city.

The defendants say, in the alternative, that if the ordinances of the City Council exceeded the powers granted by the statutes of the State they did not constitute State action, and hence the District Court had no jurisdiction to enjoin them as a violation of the Fourteenth Amendment. This proposition cannot be sustained under the existing circumstances. It is "settled that municipal ordinances adopted under State authority constitute State action and are within the prohibition of the amendment". *Lovell v. Griffin*, 303 U. S. 444, 450. In the case of a municipal corporation, the State charter creates the legislative body and grants it power to act within a certain area. In the pending case the City Council was empowered to make appropriations, tentative or permanent, for the support of the schools, and hence the acts of the City Council in a sense became the acts of the State. And even if the power

was misused in violation of the Federal Constitution, the Federal courts may issue an injunction in the same way as if an act of the General Assembly of the State had been passed in violation of constitutional rights. Indeed, the decisions go further and confirm the jurisdiction of the Federal courts to enjoin the acts of state officers who have been placed in positions of authority by the state and make invalid use of their power. Questions of this kind are not to be decided under the law of agency with reference to the power of an agent to bind his principal. In *Home Tel. & Tel. v. Los Angeles*, 227 U.S. 278, 287, the Court said:

> "* * * Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

See also *Screws v. United States*, 325 U.S. 91, 109-111.

The decision in *Barney* v. *The City of New York*, 193 U.S. 439, upon which the defendants chiefly rely, is not controlling here. The expressions of opinion therein, which may seem at variance with what has been said above, have been expressly disapproved by the later decisions of the Supreme Court. *Home Tel. & Tel.* v. *Los Angeles*, supra, at 294; *Iowa-Des Moines* v. *Bennett*, 284 U.S. 239, 246-247; *Snowden* v. *Hughes*, 321 U.S. 1, 13.

The additional contention is made that the suit must be dismissed as a suit against the State of Virginia. It is said that the purpose and effect of the injunction is to control the use of state and city funds in the State Treasury and to compel their expenditure in the operation of the schools; and hence it is in essence a suit against the state by a citizen of a state contrary to the Eleventh Amendment. The contention is that the maintenance of such a suit would be contrary to the rule laid down in such cases as *In Re Ayers*, 123 U.S. 443; *Mine Safety Co.* v. *Forrestal*, 326 U.S. 71; *O'Neill* v. *Early*, 4 Cir., 208 F.2d 286, which, for the most part, involve state debts and money in the state treasury and hold that suits may not be maintained against state officers where the purpose is to establish and compel the payment of a money obligation due by the state.

The plaintiffs in the present suit, however, do not seek an injunction to require the State to pay out any money. The school funds to be used in the operation of the Norfolk schools have already been tentatively appropriated by the City Council subject to its further order and the plaintiffs merely ask that the City Council be restrained from exerting its power of control in such a manner as to violate the constitutional rights of the pupils of both races residing in the City of Norfolk. The applicable rule as laid down

in *In Re State of New York*, 256 U.S. 490, which was quoted by Judge Parker in *O'Neill* v. *Early*, supra, to the following effect (at page 288):

> "Thus examined, the decided cases have fallen into two principal classes, mentioned in Pennoyer v. McConnaughy, 140 U.S. 1, 10: 'The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts (citing cases). The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit * * * is not, within the meaning of the Eleventh Amendment, an action against the state.' The first class, in just reason, is not confined to cases where the suit will operate so as to compel the state specifically to perform its contracts, but extends to such as will require it to make pecuniary satisfaction for any liability, Smith v. Reeves, 178 U.S. 436, 439 * * * "

See also *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, where it was held (pages 697-702) that the court may entertain a suit against a state officer for relief from actions in his official capacity—if the actions are illegal in the sense that they are not within his statutory powers, or, if the statutory powers cover the action but are constitutionally invalid or are exercised in an unconstitutional manner.

The present case falls within the class of cases where a public officer or agent makes use of his authority to perform an illegal act by invoking the command of an unconstitutional statute or seeks to carry out a valid statute in an unconstitutional manner. In such cases, it is held that his action is not the act of the state but the act of an individual, which may be restrained by the injunctive power of the Federal court. An analogous case is the decision of the Fifth Circuit in *Cook* v. *Davis*, 178 F.2d 595, where a Negro teacher in Georgia sought a declaratory judgment and an injunction against Atlanta school officials, prohibiting them from a salary discrimination aimed at teachers of the Negro race. It was there held that the suit was not, either in name or in effect, a suit against the State of Georgia, forbidden by the Eleventh Amendment.

Particular objection is made to paragraphs 3(b), (c), (d) and (g) of the injunction. Paragraphs 3(b), (c) and (d) prohibit the withholding of funds from the public schools appropriated by the budget ordinance of November 25, 1958, and from enforcing the restrictive provisions therein, which declare that the appropriation was made on a tentative basis and that no part should become available except upon resolution by the City Council, and reserve the right to change or cancel the unexpended part of the appropriation at any time during the fiscal year. Paragraph 3(g) prohibits the City Council from closing any school or any class in any school in the City of Norfolk in the exercise of the police power for more than two consecutive days without prior approval of the court. It is urged that these provisions would require the City Council to disburse the entire amount provided by the budget regardless of all circumstances or unexpected emergencies even though the City Council should be deprived of the assistance of State funds by later enactment of the General

Assembly of Virginia in the exercise of its power to control the disposition of State funds. It is also contended that the restriction of the police power of the City Council to close the schools in case of emergency is an unwarranted interference with the activities of the Council and beyond the power of the Federal court.

We do not understand the preliminary injunction to be a final adjudication of the rights of the parties, but rather an order passed in an emergency to preserve the right of the plaintiffs to a public school education. But in order that there may be no misunderstanding on this point and no interference with the rights and duties of the City Council in the execution of its powers, the judgment of the District Court will be affirmed and the case remanded for further proceedings, with direction to the court to retain jurisdiction of the case with leave to any party at any time to move for modification of the terms of the injunction.

Affirmed and Remanded.